(5)

No. 89-1821

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES Z. STEVENS, III, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether petitioner has properly preserved his claim that he satisfied the prerequisites for filing a complaint in federal district court under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(c).

2. Whether such an action is barred because petitioner's request for administrative relief under Section 633a(b) has been properly dismissed as untimely.

3. Whether petitioner satisfied the time limitations applicable to an action under Section 633a(c).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A5-A8) is unreported. The decision of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990, and was granted on November 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act of 1967, and of the regulations

promulgated by the Equal Employment Opportunity Commission thereunder, are set forth in the appendix to the petition (Pet. App. A9-A15).

STATEMENT

A. Statutory and Regulatory Background

Section 15 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, protects most federal employees who are at least 40 years old from personnel actions that discriminate on the basis of age. A protected federal employee who believes that he has suffered age discrimination in employment has two routes by which to seek relief. If the employee elects to seek direct judicial relief, he must, within 180 days of the allegedly discriminatory action, file with the EEOC a notice of intent to bring a civil action. After waiting at least 30 days (during which time the Commission informally attempts to conciliate the grievance), the employee may bring a civil action in an appropriate federal district court against his employer, the allegedly offending agency. 29 U.S.C. 633a(c) and (d).[1] The district court may award such legal or equitable relief as will effectuate the purposes of the Act. 29 U.S.C. 633a(c).

Alternatively, the employee may seek administrative relief, pursuant to 29 U.S.C. 633a(b). That subsection authorizes the EEOC "to enforce the provisions of subsection (a) * * * through appropriate remedies," and directs the Commission to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities." 29 U.S.C. 633a(b). The EEOC has issued regulations detailing the administrative remedy available to aggrieved employees. See 29 C.F.R. 1613 Subpart E. To follow this route, the employee must consult with an Equal Employment Opportunity counselor at the employing agency within 30 days of the date he knew or reasonably should have known of the allegedly discriminatory action. The counselor will then make whatever inquiry is necessary and seek to resolve the matter on an informal basis. 29 C.F.R. 1613.213(a), 1613.214(a)(1).[2] If the counselor cannot resolve the matter informally, the employee may, within 15 days, file a formal complaint of discrimination with the employing agency. 29 C.F.R. 1613.213(a). The agency may accept complaints for processing only if the time limits have been met, or if the employee has good cause for being late. 29 C.F.R. 1613.214(a)(1) and (4). Once a formal complaint is filed, the employing agency considers and decides it pursuant to the procedures specified in 29 C.F.R. 1613.215-1613.222.

If the employee is dissatisfied with his agency's determination, he may appeal to the EEOC by filing a notice of appeal within 20 days after he receives notice of the agency's final decision. 29 C.F.R. 1613.231, 1613.233(a). On receipt of a timely notice

[1] Although 29 U.S.C. 633a as reproduced at Pet. App. A9-A10 refers to the Civil Service Commission, the functions vested by this Section were transferred to the EEOC by Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (1978), and that agency is identified in the current U.S. Code provision.

[2] These Sections appear in the part of the EEOC regulations applicable to Title VII complaints of discrimination based on race, color, religion, sex, or national origin. However, 29 C.F.R. 1613.511 and 1613.521 make these aspects of the Title VII complaint processing system applicable to the processing of age discrimination complaints.

of appeal, the EEOC Office of Review and Appeals reviews the complaint file and issues a decision that is final unless the Commission, upon motion or acting *sua sponte*, decides to reopen and reconsider the case. 29 C.F.R. 1613.234-1613.235. If the employee is still dissatisfied, he retains the statutory right to file a civil action in district court. 29 U.S.C. 633a(c).

B. Facts and Proceedings Below

Petitioner is an employee of the Internal Revenue Service. In August 1986, when he was 63 years old, he entered a Revenue Officer Training Program and assumed probationary status. On April 26, 1987, after being informed that his performance in the training program was unsatisfactory, petitioner chose to request a demotion and a transfer out of the training program, rather than face possible separation from service. Pet. App. A2. He wrote his Congressman on May 21, 1987, stating that the agency's conclusion that his performance was unsatisfactory reflected discrimination on the basis of his age. J.A. 8-10. Nevertheless, petitioner did not attempt to invoke the administrative procedures for resolving age discrimination complaints by seeking a meeting with an EEO counselor until September 1987, well beyond the 30-day period for instituting such procedures. Pet. App. A2. Dissatisfied with the results of that meeting, petitioner on October 19, 1987, filed a formal administrative complaint of age discrimination with the Treasury Department.[3] J.A. 11-15. The

[3] That complaint contained the following statement (J.A. 15):

> This is also my notice of intention to sue in U.S. Civil District Court if the matter is not satisfactorily resolved.

complaint was rejected because of petitioner's delay in seeking a meeting with an EEO counselor, on the ground that he had no good cause for his tardiness. J.A. 16-19. Petitioner appealed to the EEOC. The EEOC Office of Review and Appeals affirmed the Treasury Department's rejection of petitioner's complaint as untimely, noting that petitioner's letter to his Congressman demonstrated that he knew of the alleged age discrimination at least by May 21, 1987. J.A. 20-21.

On May 3, 1989, petitioner filed a civil action against the Department of the Treasury in the United States District Court for the Western District of Texas. In his pro se complaint, petitioner stated that he "did not know of the procedures or a rule that required a charge to be lodged with an EEO Counselor within 30 days of an occurrence of age discrimination," and that the EEOC's actions "do not reflect the Congressional intent by limiting to 30 days the filing of a charge." J.A. 3, 5. The relief sought in the complaint included a demand that the "[d]efendants be required to treat the charges as timely filed." J.A. 6.

At a hearing on the merits, petitioner was represented by counsel. 3/29/89 Tr. 2. After petitioner presented his case, the government—apparently responding to the allegations in petitioner's complaint—moved to dismiss the action on the ground that petitioner had failed to establish any basis for tolling the 30-day time limit for contacting an EEO counselor. *Id.* at 79. Petitioner's counsel stated that "I think the law is that as long as notice is provided within a 180-day period, that he can bring suit at anytime by giving 30 days notice." *Id.* at 80, J.A. 22-23. In response to a comment from the district court questioning jurisdiction, however, petitioner's counsel stated that petitioner "sought counseling" and that

"prior to the EEO counselor actually granting him an interview, that he made several calls and attempted to set up appointments with EEO." 3/29/89 Tr. 81-82.[4]

After the conclusion of the hearing, the district court dismissed petitioner's complaint. It noted that there were "two avenues of relief under the ADEA." Pet. App. A3. First, as the district court saw it, the employee "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit. 29 U.S.C. Sec. 633a(d)." *Ibid.* Petitioner did not do this. The court therefore considered whether petitioner properly invoked the alternative administrative complaint procedure, and concluded that he had not, since he had neither invoked those procedures in a timely manner nor offered a satisfactory explanation for his failure to do so. *Id.* at A3-A4. Both routes were therefore blocked.

Petitioner appealed, arguing only that "the *commission's* action, in rejecting [petitioner's] complaint on the basis that it was untimely, is erroneous" because it failed to apply the time limitations for the Portal-to-Portal Act of 1947, 29 U.S.C. 255, as required by 29 C.F.R. 1626.1.[5] Pet. C.A. Br. 3 (emphasis supplied). Petitioner therefore concluded that "[s]ince * * * [petitioner] clearly filed a charge *with the Commission* within the time period allowed by 29 C.F.R. 1626.7, the trial court clearly had and continues to have the jurisdiction to decide the merits of this case." Pet. C.A. Br. 4 (emphasis supplied). Petitioner presented no argument to the court of appeals that the district court erred in its application of the 180-day and 30-day limits set forth in 29 U.S.C. 633a(d).[6] The case was submitted on the briefs.

The court of appeals affirmed the dismissal. It began its analysis by noting that "Stevens argues that the district court erred in finding that Stevens failed to file a complaint with the *Equal Employment Opportunity Commission* ("EEOC") in a timely manner." Pet. App. A6 (emphasis supplied). Addressing that argument, the court agreed with the district court that petitioner's efforts to invoke his administrative remedies were fatally tardy.[7] Pet.

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[4] Because this discussion appears to be the only time petitioner even arguably suggested the theory upon which he relies in this Court, we have reprinted petitioner's counsel's entire argument on this point in an Appendix to this brief. App., *infra*, ~~4a-5a~~ 1a - 3a.

[5] The "QUESTION PRESENTED" in petitioner's court of appeals brief stated: "If an aggrieved party fails to file an administrative age discrimination complaint in the time frame of the general administrative provision of the Equal Employment Opportunity Commission (the 'Commission'), does such failure deprive a Federal District Court of Jurisdiction to hear a civil action filed under the Age Discrimination in Employment Act where a charge has been timely filed thereunder." Pet. C.A. Br. 1-2. The two-page argument section of the brief, however, was devoted exclusively to attempting to establish the timeliness of petitioner's filing *with the Commission*. See *id.* at 3-4. In light of the petitioner's argument, the government's responsive brief discussed only the question whether petitioner's administrative complaint was timely filed. Gov't C.A. Br. 6-9. It pointed out that the Portal-to-Portal Act of 1947 provisions on which petitioner relied apply only to private sector employees. *Id.* at 8-9.

[6] We have reproduced as an appendix to this brief the entire argument section of petitioner's court of appeals brief. App., *infra*, 4a-5a.

[7] It rejected petitioner's reliance on the Portal-to-Portal Act of 1947 time limitations for initiating administrative action as inapplicable to suits by federal employees. In this Court, petitioner expressly disavows any challenge to the dismissal of his administrative action as untimely. Pet. Br. 7.

App. A7-A8. The court went on to observe that Section 633a(d) requires the filing of the notice of intent to sue with the EEOC within 180 days of the alleged discrimination, not—as the district court believed—the filing of the civil action within that time.[8] The court of appeals correctly observed that this requirement was satisfied by petitioner's statement in his October 19, 1987 administrative complaint that he would seek judicial review if the complaint was not resolved to his satisfaction administratively. See J.A. 15. But the court then stated, without further explanation, that because petitioner did not file his civil action until May 1988, his October 1987 notice "was not effective." Pet. App. A7.

SUMMARY OF ARGUMENT

The court of appeals correctly decided the question it was asked to decide: whether petitioner's request for administrative relief under the Age Discrimination in Employment Act of 1967 was timely. It was not, and petitioner no longer contends that it was. Pet. Br. 7. The court of appeals erred in its discussion of the question petitioner now asks this Court to decide: whether petitioner's civil action in district court under the ADEA was timely. Pet. Br. i. It was. Because petitioner did not properly present this latter question below, and because his failure to do so may well have contributed to the lower court's error and the ambiguous treatment of the issue below, this

[8] The court of appeals did not mention the district court's other error in interpreting Section 633a(d): its reading of the requirement that suit be filed "not less than thirty days" after notice to the EEOC as meaning that suit had to be filed *within* 30 days of notice. Pet. App. A3.

Court should not address that question for the first time.

1. This case presents no extraordinary circumstances justifying a departure from this Court's usual practice of not addressing issues that have not been properly preserved. Instead, it demonstrates the wisdom of that procedure. Had petitioner addressed the applicability of the provisions of the ADEA authorizing the filing of a civil action in district court, it is unlikely that the courts below would have misread the requirement that the EEOC receive no less than 30 days' notice of the complainant's intent to sue. At the very least, the basis for the court of appeals' decision would have been clarified, thus facilitating review by this Court. Instead, petitioner never raised the question of the district court's treatment of the time limits set forth in 29 U.S.C. 633a(d)—the basis for the questions now presented to this Court. Indeed, petitioner never once quoted from or even *cited* Section 633a(d) in his entire court of appeals brief.

If this Court nevertheless concludes that the merits of petitioner's current claim are ripe for review, we agree with petitioner's assertion that he was entitled to maintain his age discrimination action in district court.

2. a. Application of the policies underlying the doctrine of exhaustion to the ADEA's administrative scheme shows that petitioner in fact exhausted such remedies as were available to him before commencing his civil action. The policies underlying exhaustion doctrine include (1) avoidance of improper judicial interference with pending administrative processes, and (2) affording an agency the first chance to rule on the merits of a case before it comes before a court. In this case, petitioner did not seek judicial relief

during the pendency of the administrative process, and so policies of the first sort are inapplicable. Policies of the second sort are inapplicable because Congress has expressly provided in the ADEA that federal employees may seek judicial relief for their age discrimination complaints without first seeking administrative relief. Accordingly, petitioner should be held to have exhausted his administrative remedies despite his tardy invocation of the administrative process.

b. Even if petitioner failed to exhaust his administrative remedies, he would still be entitled to seek judicial relief, because the ADEA provides alternative, independent routes for the review of age discrimination complaints by federal employees. Unlike Title VII, the ADEA contains no express or implicit exhaustion requirement, and none is contained in the EEOC's implementing regulations. Indeed, those regulations indicate that there is no exhaustion requirement, and they are so interpreted by the EEOC. That interpretation is at least a reasonable reading of the ADEA, and is entirely consistent with the statutory purpose of providing for speedy resolution of age discrimination claims by federal employees. The interpretation of the EEOC—the agency responsible for implementing the federal sector ADEA requirements—is therefore entitled to judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. If petitioner were seeking direct judicial review of his age discrimination complaint, he met all timeliness requirements applicable to such a suit. He notified the EEOC of his intent to file a civil action within 180 days of the allegedly discriminatory event, and he then waited at least 30 days before

bringing the action. He filed the action within any statute of limitations that might apply to the case.

ARGUMENT

I. PETITIONER FAILED TO PRESERVE HIS CLAIM THAT HE IS ENTITLED TO MAINTAIN A CIVIL ACTION UNDER THE ADEA, DESPITE HIS TARDY INITIATION OF ADMINISTRATIVE REVIEW

We argued in opposition to the petition for certiorari that the issues petitioner presents to this Court were not properly preserved below. Br. in Opp. 5-7. We recognize that this Court's customary refusal to consider issues not so preserved is a prudential, rather than a jurisdictional rule. See *Demarest* v. *Manspeaker*, No. 89-5916 (Jan. 8, 1991), slip op. 4; *Department of Treasury, I.R.S.* v. *Federal Labor Relations Auth.*, 110 S. Ct. 1623, 1630 (1990); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 363-368 (and cases there cited). We nevertheless continue to believe that this case does not present exceptional circumstances justifying a departure from that practice.[9]

Petitioner's argument in this Court is that he complied with the timing requirements for filing suit

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[9] Although a claim that a court *lacks* jurisdiction may be raised at any time (Fed. R. Civ. P. 12(h)(3)), there is no similar rule permitting the assertion of a claim that a court *had* jurisdiction on a previously unclaimed basis.

under 29 U.S.C. 633a(c) and (d), because he afforded the EEOC notice of his intent to sue within 180 days of the alleged discriminatory action and at least 30 days before filing suit. The district court committed two errors: it assumed that suit had to be filed within 180 days of the discriminatory act, and that notice had to be given within 30 days of suit. Pet. App. A3. The court of appeals corrected the first error, *id.* at A7, but apparently not the second. But petitioner never asked it to. His entire argument before the court of appeals was directed to an entirely different issue: whether petitioner's invocation of the *administrative* route for relief was timely. The time limits petitioner now says are at issue are set forth in 29 U.S.C. 633a(d), yet that provision was never quoted or even cited in petitioner's brief before the court of appeals.[10] Instead, petitioner's only argument was that he timely "filed a charge *with the Commission*" and that "the *commission's* action, in rejecting [petitioner's] complaint on the basis that it was untimely, is erroneous." App., *infra*, 4a (emphasis supplied). As the court of appeals properly recognized, petitioner's argument was that he "file[d] a complaint with the *Equal Employment Opportunity Commission* ("EEOC") in a timely manner." Pet. App. A6 (emphasis supplied). Section 633a(d)—the provision on which petitioner now relies—has nothing to do with the timeliness of complaints filed with the EEOC; it applies "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission." 29 U.S.C.

[10] The provision is cited more than 50 times in petitioner's brief before this Court.

633a(d); see 29 U.S.C. 633a(b) (provisions for administrative relief).[11]

Given that petitioner had nothing to say in the court of appeals about the time requirements of 29 U.S.C. 633a(d)—*even though the district court's ruling was based on them*, see Pet. App. A3—it is perhaps not surprising that the court of appeals failed fully to correct the district court's misinterpretation of that provision. It seems unlikely that the courts would have persisted in the misreading of the 30-day notice requirement as requiring the filing of the civil complaint *within* 30 days of notice to the EEOC, rather than *no sooner than* 30 days after such notice, if petitioner had brought this error to their attention, even in a petition for rehearing. Instead, petitioner asserts for the first time in this Court that he is relying on the provisions of Section 633a(d), and asks this Court to correct the rather obvious—but under petitioner's previous theory of his case insignificant—error of the lower courts in

[11] Petitioner's theory before the district court can best be described as unclear. The complaint included as attachments the administrative complaint and the agency and EEOC decisions rejecting that complaint as untimely, suggesting that petitioner sought review of that determination. In addition, the complaint expressly challenged the rule requiring contact with an EEO counselor within 30 days, and sought an order that "[d]efendants be required to treat the charges as timely filed." J.A. 5, 6. At the district court hearing, petitioner's counsel stated his view that suit could be filed anytime by giving 30 days notice, but then went on to respond to a question concerning jurisdiction by discussing petitioner's efforts to seek EEO counseling—efforts that are pertinent only to the administrative route. App., *infra*, 2a-3a. In any event, the argument before the court of appeals was strictly limited to the timeliness of petitioner's invocation of administrative relief. *Id.* at 4a-5a.

interpreting that Section. This Court does not sit to save petitioners from the results of their litigating errors in the lower courts.

Petitioner's other claim, that the courts misconceived the relationship between the administrative and the direct judicial review procedures of the ADEA, further illustrates the basis for the Court's prudential rule. Petitioner's failure to assert his current theory of his case has deprived this Court of the assistance of the consideration of that theory by the lower courts on an adequate record. The court of appeals had no occasion to consider the relationship between the two avenues for relief under the ADEA because petitioner's argument was concerned only with establishing that he timely invoked the administrative route. The utility of briefing and argument below in clarifying and focusing matters for disposition by this Court is obvious.[12] There has been no such consideration here, and the rationale for the appellate court's conclusion that petitioner's notice of intent to sue was "not effective" remains unclear. Petitioner asks this Court to consider de novo the merits of a position that he never articulated to the court of appeals, and to reverse the judgment of that court on a ground it was never afforded an opportunity to consider.[13]

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[12] Even if petitioner's statement of the issue presented in his court of appeals brief comprehends the issue he now presents to this Court (see note 5, *supra*), his failure to present any argument whatever in support of that statement means that he did not preserve it on appeal. *Harris* v. *Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980); *Volyrakis* v. *M/V Isabelle*, 668 F.2d 863, 865 n.1 (5th Cir. 1982); *Larkin* v. *United Assoc. of Journeymen, Local 53*, 338 F.2d 335, 336 (1st Cir. 1964). See Fed. R. Civ. P. 28(a)(4).

[13] Petitioner's objection to the "implicit ruling of the court of appeals" regarding the relation between the administrative and direct review procedures (Pet. Br. 7) and his objection to what the court "may have" done (Pet. Br. 10) point up this difficulty: the ruling was "implicit" precisely because petitioner failed to present the issue to the court.

For these reasons, we submit that, far from constituting the exceptional case warranting a departure from this Court's usual practice of refusing to consider issues not properly raised below, this case is a prime example of the wisdom of that practice. Nevertheless, this Court's grant of the petition indicates that it has, at least initially, determined that the issues petitioner presents are ripe for plenary review. Accordingly we will presume for the balance of the brief that petitioner sufficiently asserted in the courts below not simply that he timely invoked his administrative remedy, but also that he satisfied all the time limits applicable to a civil action in district court, and that he may maintain such an action despite his failure to initiate his request for administrative review in a timely manner.

II. PETITIONER'S DELAY IN SEEKING ADMINISTRATIVE REVIEW OF HIS CLAIM OF AGE DISCRIMINATION DOES NOT PRECLUDE A JUDICIAL ACTION BASED ON THAT CLAIM

Although this Court has never expressly considered the matter, it seems clear that a federal employee who has exhausted his administrative remedies is entitled to de novo judicial consideration of his age discrimination complaint. This Court has recognized that federal employees have that right under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). The similarities between Title VII and the ADEA strongly suggest that Congress intended federal employees to have the same right to

de novo judicial consideration of their age discrimination complaints as they have with regard to Title VII complaints, and the circuit courts that have addressed the issue have consistently so held. *Kontos* v. *United States Dep't of Labor*, 826 F.2d 573, 575 n.4 (7th Cir. 1987); *Rosenfeld* v. *Department of the Army*, 769 F.2d 237 (4th Cir. 1985); *Nabors* v. *United States*, 568 F.2d 657 (9th Cir. 1978).[14]

At the same time, nothing in the ADEA—in sharp contrast to Title VII—requires resort to administrative processes prior to seeking judicial relief. Section 633a(c) simply provides that any person aggrieved may bring a civil action, and the notice requirement of Section 633a(d) expressly contemplates situations in which an individual files a civil action without first filing a complaint with the EEOC. The

[14] This Court recently granted certiorari in *Astoria Federal Savings & Loan Assoc.* v. *Solimino*, No. 89-1895 (cert. granted Jan. 7, 1991), to resolve a conflict in the circuits over whether, in a federal court action under the ADEA, state agency findings of fact that have not been judicially reviewed have preclusive effect. Compare *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir. 1988) (preclusive effect) with *Duggan* v. *Board of Educ.*, 818 F.2d 1291 (7th Cir. 1987) (no preclusive effect). In recommending that the Court grant the petition, we took the position that, in light of the ADEA statutory scheme, preclusive effect should not be given. In addition, one circuit has held that a federal district court cannot give de novo consideration to a federal employee's age discrimination claim previously considered by the Merit Systems Protection Board in the context of a protest of his termination from government employment. *Wall* v. *United States*, 871 F.2d 1540 (10th Cir. 1989). That opinion turns on the specific statutory provisions under which the MSPB acted, not on the ADEA. See 871 F.2d at 1544 (Seymour, J., dissenting on the ground that the ADEA and the Rehabilitation Act of 1973, 29 U.S.C. 794a, dictate a different result).

courts have accordingly ruled that there is no requirement that a claimant seek administrative relief before seeking judicial relief pursuant to Section 633a(c).[15]

The circuit courts are divided, however, on the question of what happens if an employee does choose to seek administrative relief, and then either (1) abandons the process and goes to court while administrative proceedings are still pending, or (2) goes to court after failing to take a timely administrative appeal of an adverse initial agency decision. The Sixth Circuit has ruled that an employee may file the civil action authorized by 29 U.S.C. 633a(c) regardless of the pendency of any administrative proceeding, *Langford* v. *United States Army Corps of Engineers*, 839 F.2d 1192 (1988), but other circuits have held that an employee who elects to pursue administrative remedies must then exhaust them, in a timely fashion, before going to court. *McGinty* v. *United States Dep't of the Army*, 900 F.2d 1114 (7th Cir. 1990) (employee's failure to take timely EEOC appeal of adverse agency decision required dismissal of civil action); *Castro* v. *United States*, 775 F.2d 399 (1st Cir. 1985) (employee's withdrawal of administrative complaint required dismissal of civil action); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981) cert. denied, 462 U.S. 1131 (1983) (employee's abandonment of pending agency appeal required dismissal of civil action). But no court has explicitly held that an employee's election

[15] See, *e.g.*, *Castro* v. *United States*, 775 F.2d 399, 403 (1st Cir. 1985); *Ray* v. *Nimmo*, 704 F.2d 1480, 1483 (11th Cir. 1983); *Purtill* v. *Harris*, 658 F.2d 134, 138 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983); *Paterson* v. *Weinberger*, 644 F.2d 521, 523-524 (5th Cir. 1981); *Marks* v. *Turnage*, 46 Fair. Empl. Prac. Cas. (BNA) 382, 384 (N.D. Ill. 1988).

of administrative remedies somehow bars judicial relief (nor do we believe that the court below intended to so hold implicitly); rather, the question dividing the circuits is whether an employee's election of administrative remedies imposes an exhaustion requirement on the employee before he may seek judicial relief.

As noted in our opposition to certiorari (Brief in Opp. 8), we do not believe that this case presents that conflict. Although petitioner was not required to pursue administrative remedies at all, he fully exhausted that avenue of relief, and obtained a final decision that no relief was available to him from that route. If the Court nonetheless concludes that petitioner failed to exhaust his administrative remedies, we believe that such failure should not preclude a subsequent judicial action filed in compliance with 29 U.S.C. 633a(d). Petitioner met the prerequisites of that provision.

A. Petitioner Exhausted the Administrative Remedies Available to Him

Petitioner sought administrative resolution of his age discrimination complaint when he notified an EEO counselor of his grievance and then submitted a formal administrative complaint to the Treasury Department. However, because he did not contact the counselor until more than 30 days after he knew of the allegedly discriminatory action and was unable to demonstrate any good cause for this delay, petitioner's complaint was rejected. The EEOC's regulations provide that when an employee files a formal complaint with the employing agency, "[t]he agency may accept the complaint for processing * * * only if: (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter

causing him/her to believe he/she had been discriminated against within 30 calendar days of the alleged discriminatory event * * * or the date that the aggrieved person knew or reasonably should have known of the discriminatory event." 29 C.F.R. 1613.214(a). Because of petitioner's tardiness, his formal complaint was rejected in accordance with 29 C.F.R. 1613.215(a)(4). Petitioner then timely appealed to the EEOC, which affirmed the Treasury Department's action.

Petitioner did not go to federal court while his administrative claim was pending before the EEOC (as did the employee in *Purtill* v. *Harris*, *supra*), nor did he permit an intermediate agency determination to become final through his failure to seek further administrative review (as did the employee in *McGinty* v. *United States Dep't of the Army*, *supra*). Rather, after his tardy attempt to invoke the EEOC's procedures was rebuffed, he pursued his available administrative appeals, and went to court only after the EEOC's final determination that it was unable to give him any administrative relief.

This Court has made clear that there is no mechanical test for determining whether a party to an action in federal court has exhausted his administrative remedies. Rather, "application of the exhaustion doctrine is 'intensely practical.'" *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976)). A court applying the exhaustion doctrine must have "an understanding of its purposes and of the particular administrative scheme involved." *McKart* v. *United States*, 395 U.S. 185, 193 (1969); accord *Bowen*, 476 U.S. at 484; *Weinberger* v. *Salfi*,

422 U.S. 749, 765 (1975).[16] In determining whether petitioner exhausted his administrative remedies, this Court must therefore look to the purposes of the exhaustion doctrine, and to the nature of the administrative scheme created by the relevant provisions of the ADEA.

McKart discusses the purposes of the exhaustion doctrine. Requiring the exhaustion of administrative remedies prevents premature interruption of the administrative process, 395 U.S. at 193, allowing an agency to develop the necessary factual background upon which its decisions should be based, and affording the agency the first chance to exercise its discretion or apply its expertise. *Id.* at 194. The requirement also promotes both administrative efficiency and agency autonomy by allowing the administrative process to go forward without interruption at intermediate stages, and by giving the agency a chance to discover and correct its own errors. *Id.* at 194-195. The exhaustion requirement furthers judicial efficiency by allowing the agency to create a record for judicial review, and by eliminating the need for courts to hear cases in which a complaining party could have obtained relief in the administrative process. *Id.* at 195. Finally, the requirement avoids the risk that agency effectiveness will be impaired by frequent and deliberate flouting of its administrative processes. *Ibid.*

Many of these purposes are simply not relevant where, as here, the complaining party goes to court

[16] *McKart* involved the question of whether a party was required to exhaust administrative remedies; *Bowen*, *Salfi*, and *Eldridge* involved the question of whether a party had fulfilled an exhaustion requirement. However, the policy concerns cited in all the cases are similar.

only after obtaining a final agency decision denying him relief. Allowing petitioner's civil action to proceed could not implicate any of the purposes of the exhaustion doctrine that concern improper interruption of or interference with agency processes; those purposes would be implicated only by a case in which a party goes to court even though potential avenues for achieving administrative relief remain open to him. Petitioner's civil action would not interrupt any agency process, would not imperil administrative efficiency, and would not affect agency autonomy.

This case is, therefore, different from cases holding that a person who invokes the EEOC's administrative process cannot bring a civil action until the EEOC process is complete. In those cases, the courts reasoned that "[a]llowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient complainant could take his claim to the court and abort the administrative proceedings." *Purtill* v. *Harris*, 658 F.2d at 138; accord *Castro* v. *United States*, 775 F.2d at 404. Here, petitioner did not prematurely abandon the administrative process, but pursued it to its conclusion.

Accordingly, if petitioner's civil action is barred because of his failure to exhaust his administrative remedies, it must be because the affected agencies should have a first chance to rule on the merits of his case before the case goes to court—because those agencies should have a first chance at applying their expertise or exercising their discretion, or should have the chance to build the record necessary to their decision, or because insisting that parties go to the agencies first will avoid the need for judicial consid-

eration of cases that could be administratively resolved. With regard to these purposes of the exhaustion doctrine, however, Congress has spoken clearly in the ADEA. A federal employee complaining of age discrimination does not have to seek relief from his employing agency or the EEOC *at all*; he can decide to present the merits of his claim to a federal court in the first instance. See 29 U.S.C. 633a(d) (notice requirement for civil action when no complaint filed with EEOC). Congress apparently believed that other considerations outweighed the desirability of requiring that the agencies should always be given the first opportunity to consider a federal age discrimination case, and of sparing the federal courts from dealing with federal age discrimination cases that could perhaps be administratively resolved. And the building of an administrative record is not a weighty concern in these cases, because judicial review is de novo. Accordingly, it would be inconsistent with the statutory policy to deny petitioner the opportunity to bring his civil action in the name of serving these purposes of the exhaustion doctrine.[17]

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[17] Indeed, since the ADEA allows complaining parties to seek judicial relief without first seeking agency relief, to hold that a tardy agency complaint permanently bars judicial relief could only *disserve* the purpose of encouraging administrative resolution of claims. In light of such a holding, a person who had an age discrimination complaint against the federal government as to which the 30-day time limit for consulting an EEO counselor had expired would be foolish to bring his claim to the agency, even if he believed he had good cause for extension of the time limit. If the agency ultimately found his complaint to be tardy, all relief would be closed to him. Such a person would therefore be forced to bring his case directly to court, and the courts would be burdened with a case that might have been administratively resolved.

Although a party's failure to meet administrative deadlines is often treated as a failure to exhaust administrative remedies, petitioner's tardy attempt to invoke an administrative process that he was not required to invoke at all does not implicate any of the policy concerns that underlie the exhaustion doctrine. Accordingly, that doctrine should not prevent petitioner from maintaining his civil action against the Treasury Department.

B. A Federal Employee Who Elects Agency Review Of An Age Discrimination Complaint Need Not Exhaust His Administrative Remedies Before Bringing A Civil Action

If this Court finds that petitioner did not exhaust his administrative remedies, it will be necessary to decide whether a federal employee who invokes the EEOC's administrative process with a complaint of age discrimination must exhaust that process before filing the civil action authorized by 29 U.S.C. 633a(c). It is on this question that the lower courts are divided.

Although "courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided[,] * * * the initial question whether exhaustion is required should be answered by reference to congressional intent." *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 501 (1982). In this case, the best indicator of congressional intent lies in a comparison of the statutory provisions regarding civil actions by federal employees under the ADEA and under Title VII.

A federal employee who claims to have suffered employment discrimination on the basis of race, color,

sex, religion, or national origin must seek relief through the EEOC's administrative process before going to court, for Title VII authorizes the filing of a civil suit only after the administrative process has been invoked. 42 U.S.C. 2000e-16(c). However, under Title VII, a federal employee who has filed a formal complaint of discrimination with the employing agency may file a civil action after 180 days if the agency has not reached a decision on the complaint. A federal employee may also file a civil action after 180 days from the filing of an appeal with the Commission, if the Commission has not reached a decision. *Ibid.*; 29 C.F.R. 1613.281(b) and (d).

The provision granting the right to file civil actions under the ADEA is significantly different. It is not conditioned on the complainant's having taken any particular steps towards seeking administrative relief. Section 633a(c) of Title 29 simply states that any aggrieved person may file a civil action in a federal district court of competent jurisdiction. The only statutory precondition for this action—Section 633a (d)'s requirement that the employee give the EEOC notice within 180 days of the discriminatory act and at least 30 days before suit—is unrelated to the processing of an agency complaint. Indeed, Section 633a (d) expressly contemplates the filing of suit by an employee who "has not filed a complaint concerning age discrimination with the Commission"—provided the 30-day notice is given. There is, therefore, no statutory requirement that a request for administrative relief precede the filing of a civil action.

This difference between Title VII and the ADEA strongly suggests that Congress did not intend age discrimination complaints to be subject to an exhaustion requirement. Indeed, a contrary holding would mean that although federal employees who complain

of discrimination based on race, color, sex, religion, or national origin are guaranteed the right to file a civil action 180 days after filing their agency complaints, federal employees who complain of age discrimination—and who elect to seek administrative relief—would be obliged to await an agency decision on their complaints, no matter how long the agency might take. Since age discrimination complainants presumably have a somewhat more limited amount of time within which to obtain relief if it is to be meaningful, Congress could hardly have intended to leave them helpless if the relevant agencies are unable to move expeditiously on their complaints, while guaranteeing the right to seek judicial relief within 180 days to those who file complaints of discrimination on the basis of race, color, sex, religion, or national origin. Nor would it make sense to say that because age discrimination complainants have the option of going directly to court, they assume the risk of indefinite agency inaction by electing to file an administrative rather than a civil complaint. Surely by providing dual avenues of relief, Congress intended to increase, not decrease, a complainant's chances of obtaining swift relief.

It is true, as the Third Circuit observed in *Purtill* v. *Harris*, 658 F.2d at 138, that provision for suit in the event of agency inaction is "[c]onspicuously absent" from the ADEA; this led that court to conclude that age discrimination complainants must wait until their administrative complaints are resolved before going to court.[18] However, also conspicuously absent

[18] The EEOC is considering the issuance of regulations that would fill this statutory gap by providing that an individual who files an administrative ADEA complaint may—like the Title VII complainant—file a civil action after 180 days if the

from the Act is a requirement that complainants seek administrative relief at all, or that they exhaust their administrative remedies if they choose to invoke them. The far more natural inference from this congressional silence is that age discrimination complainants, unlike Title VII complainants, need not wait any particular amount of time after filing their administrative complaints before going to court.

It is true that allowing complainants who invoke the administrative process to abandon it while it is pending would deprive the agency of the chance to correct its own errors, and would normally be considered an infringement of agency autonomy. This is not the normal way to conduct business, and reasonable minds could certainly devise a different relationship between the administrative and judicial avenues of relief for an age discrimination complaint. Here, however, the EEOC has concluded that age discrimination complainants may seek judicial relief while administrative procedures are pending.[19] The EEOC's

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employing agency has not reached a decision on the complaint, or after 180 days from the filing of an appeal with the EEOC, if the Commission has not reached a decision. 54 Fed. Reg. 45,763 (1989). The Notice of Proposed Rule Making explains that this regulation "address[es] the exhaustion of remedies problems raised by the decision in *Purtill* v. *Harris*" and similar cases. *Id.* at 45,750. Thus, the proposed regulations reflect the agency's conclusion that, in light of the judicial imposition of an exhaustion requirement, an employee should have some way of escaping from an overly extended administrative process—the regulations do not reflect an independent agency determination that an exhaustion requirement should be imposed.

[19] Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975) (exhaustion doctrine's purposes relating to agency autonomy are satisfied if agency believes case ready for judicial consideration). *Salfi* counsels a court to accept an agency determination that the party before it has sufficiently exhausted administrative procedures. It follows that an agency's determination that no exhaustion requirement applies to its procedures should be equally conclusive: if courts nevertheless imposed an exhaustion requirement, the agency could simply adopt a policy of never challenging a party's failure to exhaust administrative remedies. Under *Salfi*, the agency's determination would be conclusive in each case. For all practical purposes, that result would be the same as accepting the agency's generalized determination that there is no exhaustion requirement.

regulations state that an employee's filing of a civil action will terminate the processing of any administrative complaint asserting the same claim. 29 C.F.R. 1613.513. This regulation demonstrates the Commission's conclusion that employees may file—and the court may consider—a civil age discrimination complaint before administrative procedures are completed. Otherwise, the termination of administrative review would deprive the complainant of any opportunity to obtain an adjudication on the merits, either administratively or judicially. That is clearly not what the regulation contemplates, and it has not been so interpreted by the EEOC. See *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989) (agency interpretation of own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation").

The Commission's regulations also provide that while its Title VII regulations will generally govern the processing of age discrimination complaints, Sections 1613.281 and 1613.282 shall not apply in that context. 29 C.F.R. 1613.514. Those Sections reflect the statutory right to file a civil action under Title VII at certain points in the administrative process.

There is no regulation providing the right to file a civil action under the ADEA, because that statutory right is independent of the administrative process.[20]

Congress has entrusted the administration of the ADEA federal employment requirements to EEOC. Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), EEOC's interpretation of those requirements—if reasonable and consistent with the statutory purposes—is entitled to judicial deference. Accord *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990). The relevant purpose of the ADEA is to provide federal employees who complain of age discrimination with a forum in which to air their complaints. The Act provides, without any limitation other than the notice requirement of Section 633a(d), that any aggrieved person may file a civil action in district court. It is certainly reasonable for the agency to conclude that the Act imposes no exhaustion requirement. Furthermore, it is particularly consistent with the purpose of remedying age discrimination that complainants be given the option of proceeding directly to whatever forum they think likely to give them the swiftest relief. Accordingly, because the EEOC's interpretation of the Act is reasonable and consistent with the Act's purposes, that interpretation should be upheld under *Chevron*.

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[20] At several points before the district court, petitioner's counsel stated that petitioner had "30 days from the time that all the appeals were exhausted" to file suit, and that he "filed within the 30 days allowed for filing a claim in District Court." App., *infra*, 1a. There is, however, no such 30-day requirement; such a requirement is applicable to Title VII claims, but it is expressly inapplicable under the ADEA. See 29 C.F.R. 1613.514.

III. PETITIONER SATISFIED ALL TIMELINESS REQUIREMENTS FOR BRINGING HIS CIVIL ACTION

There are two potentially relevant time limits for bringing a civil action pursuant to 29 U.S.C. 633a(c): first, the time limit for giving notice to the EEOC of an intent to bring a civil action; second, the statute of limitations.

Petitioner clearly satisfied the first requirement. As the court of appeals recognized, he gave notice of the intent to sue within 180 days of the allegedly discriminatory action, as Section 633a(d) requires.[21] He then waited "not less than thirty days" before filing his civil action, as that Section also requires. The court of appeals may, like the district court (Pet. App. A3), have misread this statutory requirement as requiring that suit be filed *within* 30 days of the notice, instead of *after* 30 days from the date of the notice. Pet. App. A7; see also n.20 *supra*. Since petitioner did not contend in the court of appeals that he had satisfied the direct review provisions of the statute, the opinion is very cryptic on this point. In any event, the statute is clear.

The statute requires only that the employee give the Commission at least 30 days' notice of an intent to file a civil action; it does not expressly place any limitation on the time within which federal employees may seek judicial relief for complaints of age discrimination. The decisions of this Court indicate that where a federal statute fails to place any time limitation on the civil action it authorizes, the courts will

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[21] The EEOC has consistently accepted notices given to the employing agency as sufficient compliance with the statutory notice requirement. See Management Directive EEO-MD 107, Ch. 12, at 12-2 and 12-3.

assume that Congress intended that courts would impose an appropriate limitation, borrowed either from a state statute or from an analogous federal statute. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146-147 (1987). It is unnecessary in this case to determine what the time limit is for the bringing of civil actions authorized by 29 U.S.C. 633a(c).[22] Petitioner filed his civil action one year and six days following the allegedly discriminatory event.[23] That is well within whatever statute of limitations might apply to the action.[24]

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[22] The proposed EEOC regulation (see note 18, *supra*) adopts the two or three year (depending on whether the discriminatory action was wilful) statute of limitations applicable to private sector ADEA law suits. 54 Fed. Reg. 45,750, 45,763 (1989). In contrast, the "Notice Of Appellant's Right To File A Civil Action" sent to petitioner states that "you *MAY* have up to six years after the right of action first accrued in which to file a civil action," referring to the general statute of limitations for civil actions against the government, 28 U.S.C. 2401. *Stevens* v. *Department of the Treasury*, No. 88-2012 (E.E.O.C. Mar. 30, 1988) slip op. R-1.

[23] Petitioner assumes (Pet. Br. 11) that the relevant time is that between the filing of the notice of intent to sue and the filing of the suit. Statutes of limitation typically limit the time from the claimed injury to the commencement of the lawsuit.

[24] See, *e.g.*, *Coleman* v. *Nolan*, 49 Fair Empl. Prac. (BNA) 385, 387 (S.D.N.Y. 1988) (claim untimely under either 3-year limitations period of 42 U.S.C. 1981 or 2-3 year private sector ADEA limitations period); *Marks* v. *Turnage*, 46 Fair Empl. Prac. Cas. (BNA) at 382-384 (6-year limitations period applicable to public sector ADEA claims); *Wiersema* v. *TVA*, 41 Fair Empl. Prac. (BNA) 1588, 1589 (E.D. Tenn. 1986) (2-3 year limitations period for private sector ADEA claims applicable to public sector claims).

CONCLUSION

The petition should be dismissed as improvidently granted. If the Court concludes, contrary to our submission, that the issue petitioner presents is ripe for review, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1991

APPENDIX

MARCH 29, 1989 TRANSCRIPT

MR. McKEE: Your Honor, I believe that the evidence does show that Mr. Stevens did begin to attempt to go through the process to get a valid claim filed, although he was not at any given point in time assured, or did not know that was in fact the reason for the transfer, in addition or from his position as a revenue officer trainee. In addition, I believe the law is, and the Age Discrimination in Employment Act, different than in other civil rights actions in that a party, a complainant could forego the EEO complaint route completely, the administrative route. I believe that what they are suggesting is that he must complete the administrative route before he can bring suit in this Court. I don't believe that that is the law. I think the law is that as long as notice is provided within a 180-day period, that he can bring suit at anytime by giving 30 days notice to the parties involved. I think he did in fact do that within the 180 days, that the procedure, until the time of the appeal, or the denial of his appeal by the review board, which is part of the Government's record in terms of its exhibits, that he had 30 days from that time period and he would have been effectively estopped from filing it until, or while the appeals people had jurisdiction over his claim. So, I believe that the proper posture of the claim is that he had 180 days to say something, and 30 days from the time that [81] all the appeals were exhausted, which did not occur until he received notice in April of 1987 that his appeal was rejected. Once rejected, he then had 30 days in which to file this action. And I believe that is the proper posture of the case, and is the proper posture of the law.

THE COURT: Are you telling me that his administrative appeals with the IRS ended in April, 1987?

MR. McKEE: That is correct.

THE COURT: They told him, he appealed, went that route. And in April, those appeals came to an end.

MR. McKEE: That is correct.

THE COURT: And the only place he had then to go was, you are saying, the Court, or someplace to let them know?

MR. McKEE: Within 30 days.

THE COURT: When was this suit filed, and what action was taken between April and September of '87?

MR. McKEE: Of '87?

THE COURT: Yes.

MR. McKEE: Well, between April and September of '87, he began trying to redress the wrongs he felt had been done to him. He went to the Union.

THE COURT: That doesn't give me jurisdiction. Go head.

MR. McKEE: I understand. He sought counseling. I [82] think the evidence does show that prior to the EEO counselor actually granting him an interview, that he made several calls and attempted to set up appointments with EEO. It was, they were the ones that didn't grant him the appointment. When he did in fact get an appointment, he went through the entire process. He went through the process on the local level, went through the process of appeal. That appeal was decided at the regional—at the highest level of appeals in Washington, I believe. And that opinion was sent back to him, decided in March, March 30th. And then the decision got to him on

April the 4th of 1988. He thereupon filed within the 30 days allowed for filing a claim in District Court.

THE COURT: Okay. Do you care to respond to that?

MS. SMITH: I'm not sure. For one thing, I am not sure what the relevance. We are not debating that he filed a lawsuit timely after the appeals process was exhausted. But the whole point of the decision of the EEOC was that his complaint was not timely with the administrative agency. I am not sure whether the documentation is, but they, I don't know, they are saying he attempted to talk to a counselor, but I don't know that date. And they haven't really—they say, or he—there was a timely approach to counseling, but where is the evidence of that date?

THE COURT: Well, I am going to take the matter along with the rest of the case at this time. I will just [83] take the matter under advisement. Your motion is timely made. Thank you.

* * * * *

PET. C.A. BRIEF

Argument

In reaching its decision the courts relied on 29 C.F.R. § 1613.214(a). Appellant asserts that the appropriate analysis for jurisdiction of this cause should be based on 29 C.F.R. 1626.1 et seq.

> 29 S.F.R. 1626.7(a) states, "Charges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in Sec 6 of the Portal to Portal Act of 1947."

The relevant provision of the Portal to Portal Act is found at 29 U.S.C. § 255. It states in relevant part,

> "Any action commenced on or after the date of the enactment of this act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938. . .
>
> > (a) . . . . may be commenced within 2 years after the cause of action accrued."

Since the provisions of 29 C.F.R. §§ 1626.1 et seq. were specifically written to cover complaints and charges filed pursuant to the Age Discrimination In Employment Act, these provisions clearly control the Commission's actions as they relate to such complaints and/or charges based on age discrimination. Therefore the commission's action, in rejecting Mr. Stevens complaint on the basis that it was untimely, is erroneous.

The courts opinion relies on the above-stated Commission finding that, in order to be timely filed, Mr. Stevens complaint needed to have been filed within 30 days of it discovery.

Further, at the time of the court's hearing in this matter, the Congress of United States had enacted the Age Discrimination Claims Systems Act of 1988. That statute provides for the extension of the statute of limitations for civil actions to be brought under the Age Discrimination in Employment Act of 1967. This new statute provides that an aggrieved person under the Act has 540 days beginning on the date of the enactment of the Act (April 1988) to file a civil action if a charge has been timely filed under the Age Discrimination in Employment Act after December 31, 1983. Since, even with a reading most unfavorable to the Appellant, the Appellant clearly filed a charge with the Commission within the time period allowed by 29 C.F.R. 1626.7, the trial court clearly had and continues to have the jurisdiction to decide the merits of this case.

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